

1
2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Tucson Medical Center,

10 Plaintiff,

11 v.

12 Purdue Pharma LP, et al.,

13 Defendants.
14

No. CV-19-00358-TUC-RCC

ORDER

15 This Emergency Motion to Remand and For Sanctions (“Motion”) arises from the
16 Defendants’ second attempt to remove this case from the Pima County Superior Court.
17 Following the Defendants’ Notice of Removal, Plaintiff, Tucson Medical Center, filed this
18 Motion to Remand and For Sanctions. Doc. 1. The Motion was placed on an expedited
19 briefing track and has been fully briefed as of July 31, 2019. For the reasons set forth
20 herein, Plaintiff’s Emergency Motion to Remand and For Sanctions is **granted in part and**
21 **denied in part.**
22

23 **Background**
24

25 This opioid related lawsuit arises from the harm allegedly suffered by Plaintiff,
26 Tucson Medical Center (“TMC”), because of Defendants’ “unlawful marketing, sale, and
27 distribution of prescription opioids.” Doc. 2-3 at ¶ 19.
28

1 On October 9, 2018, Plaintiff filed the instant action in Pima County Superior Court.
2 Doc. 2-3. This action was filed after the Plaintiff's dismissal of a similar preceding action.
3

4 A. The Predecessor Action

5 On August 22, 2018 Plaintiff filed an action in the Pima County Superior Court
6 naming multiple defendants including the Mckesson Corporation ("Mckesson"), and
7 AmerisourceBergen Drug Corporation ("Amerisource") as Defendants. *Tucson Med. Ctr.*
8 *v. Purdue Pharma L.P.*, No. 4:18-cv-481-RCC (D. Ariz. Sept. 25, 2018), Doc. 1-3
9 (Complaint). Thereafter, Defendant Amerisource filed a Notice of Removal, asserting
10 federal question jurisdiction under the Controlled Substances Act ("CSA"). *Id.* at Doc. 1
11 (Notice of Removal). Specifically, Amerisource alleged that the CSA governs the reporting
12 and shipping duties concerning suspicious opioid orders. *Id.*
13

14 In addition to Amerisource's argument under the CSA, Defendant Mckesson
15 supplemented the Notice of Removal with an additional argument that removal was proper
16 under the Federal Officer Removal Statute. *Tucson Med. Ctr.*, No. 4:18-cv-481-RCC at
17 Doc. 13 (Supplement to Removal). Mckesson alleged that its distribution of prescription
18 opioids was at the direction of a federal officer based on the Pharmaceutical Prime Vendor
19 Contract with the United States Department of Veterans Affairs. Thus, Mckesson argued
20 removal jurisdiction was proper. *Id.* The case was ultimately removed to federal court
21 where Plaintiff voluntarily dismissed its complaint without prejudice. *Id.* at Doc. 51 (Notice
22 of Voluntary Dismissal).
23
24
25
26

27 B. The Instant Action

28 Following the dismissal of the preceding action, Plaintiff filed another Complaint

1 with the Pima County Superior Court. Doc. 2-3. In the newly filed Complaint, Plaintiff
2 named the same defendants except for Defendant Mckesson. Among the named
3 Defendants are Insys Therapeutics, Inc. (“Insys”), an Arizona resident, and Amerisource.
4 Doc. 2-3.

5
6 Shortly after the filing of this action, Amerisource removed the case to this Court,
7 again asserting federal question jurisdiction under the CSA. *Tucson Med. Ctr. v. Purdue*
8 *Pharma L.P. et al.*, No. 4:18-cv-532-RCC (D. Ariz. Oct. 29, 2018), Doc. 1 (Notice of
9 Removal). As a result, Plaintiff moved to remand the action back to state court and the
10 remand was granted. *Id.* Doc. 36 (Remand Order). In its opinion, this Court determined
11 that Amerisource “failed to show that the Plaintiff must prove a violation of federal law to
12 prevail on its claims.” *Id.*

13
14
15 After returning to state court, the case progressed until June 10, 2019 when
16 Defendant Insys filed a Notice of Bankruptcy. Doc. 2-25 at 14. The following day, the state
17 court issued an automatic stay of claims against Insys. *Id.* at 14-15. At a subsequent
18 hearing, Defendants requested a continuance to determine if the stay of claims against Insys
19 extended to Plaintiff’s claims against other Defendants as well. Doc. 2-25 at 45. The State
20 Court denied Defendants request for a continuance. *Id.* Afterwards, Plaintiff dismissed
21 three of its eleven claims against Insys with prejudice noting its desire to proceed against
22 all other Defendants without being delayed by a stay of claims related Insys. Doc. 2-5 at
23 11-13; June 14, 2019 Hr’g Tr. At 11:1-13:22.

24
25
26
27 Following the dismissal of claims against Insys, Defendants filed a second Notice
28 of Removal, this time, citing diversity jurisdiction. Doc. 2. Now, Defendants petition this

1 Court to sever Insys, as a dispensable party under Federal Rule of Civil Procedure 19, to
 2 perfect diversity jurisdiction.

3 Legal Standard for Removal Jurisdiction

4
 5 Generally, “any civil action brought in a State court of which the district courts of
 6 the United States have original jurisdiction, may be removed by the defendant or the
 7 defendants, to the district court of the United States for the district and division embracing
 8 the place where such action is pending.” 28 U.S.C. § 1441. District courts have original
 9 jurisdiction over actions where there is diversity of citizenship. 28 U.S.C. § 1332(a). For
 10 diversity jurisdiction to exist, Plaintiff and Defendants must be citizens of different states
 11 with an amount in controversy exceeding \$75,000. *Id.* The party seeking removal has the
 12 burden of establishing federal jurisdiction to warrant removal. *Prize Frize, Inc. v. Matrix*
 13 *Inc.*, 167 F.3d 1261, 1265 (9th Cir.1999). When assessing removal claims, “the removal
 14 statute is strictly construed against removal jurisdiction.” *Id.* Any doubt as to the right of
 15 removal is resolved in favor of remand back to the state court. *Gaus v. Miles, Inc.*, 980 F.2d
 16 564, 566 (9th Cir.1992).

17 Analysis

18 A. Defendants’ Request to Sever

19
 20 Here, there is no diversity of citizenship among the parties and, as a result, no federal
 21 jurisdiction. It is axiomatic that, for diversity to exist, the plaintiff and each defendant must
 22 be citizens of different states. There is no dispute that Defendant Insys is an Arizona
 23 resident that shares its citizenship with Plaintiff, TMC. There is also no assertion Plaintiff
 24 joined Defendant Insys fraudulently. Since citizenship is shared by Plaintiff and one of the
 25
 26
 27
 28

1 Defendants, diversity jurisdiction does not exist, and this Court will not hear the case.

2 Normally, the inquiry would stop after determining a lack of subject matter
3 jurisdiction. However, Defendants have petitioned this Court to take a different course of
4 analysis. Defendants petition the Court to sever Defendant Insys as a dispensable party,
5 under Federal Rule of Civil Procedure 21, to perfect jurisdiction. Doc. 17 at 12-13. Only
6 after severing Insys should the Court determine the presence of jurisdiction. This Court
7 refuses to do so.
8

9
10 The foundation of the District Court's ability to act is its jurisdiction over the case
11 itself. Therefore, the inquiry must begin at whether jurisdiction exists. Where jurisdiction
12 does exist, the inquiry goes further. Here, there is no jurisdiction and the inquiry must
13 cease. There is an exception where the court may find jurisdiction after severing a party
14 under Federal Civil Procedure Rule 21. However, this Court refuses to employ its Rule 21
15 power, in this instance, for two reasons.
16
17

18 First, the case law supports a strong presumption against the exercise of Rule 21
19 severance. *Prize Frize, Inc.*, 167 F.3d at 1265 ("the removal statute is strictly construed
20 against removal jurisdiction."); *See also Geographic Expeditions, Inc. v. Estate of Lhotka*
21 *ex rel Lhotka*, 599 F. 3d 1102, 1107 (9th Cir. 2010). If this Court finds that there is any
22 ambiguity as to the right of removal, remand is required. *Gaus v. Miles, Inc.*, 980 F.2d at
23 566. District courts have been very hesitant to use their rule 21 power to create jurisdiction
24 where none exists. *Brown v. Endo Pharms., Inc.*, 38 F. Supp. 1312, 1326 (S.D. Ala. 2014);
25 *In Re Darvocet, Darvon & Propoxyphene Prods. Liab. Litig.*, 2013 WL 3872230 at *12
26 (E.D. Ky. July 25, 2013). This line of cases presents a strong argument in favor of remand
27
28

1 that the Defendant has not sufficiently rebutted.

2 Moreover, the Defendants' request is impracticable. The Defendants request that
3 this Court sever Insys under Federal Civil Procedure Rule 21. However, "a court's use of
4 Federal Rule of Civil Procedure 21 presumes that the court has subject matter jurisdiction
5 over the claims." *In re: Bard Ivc Filters Prod. Liab. Litig.*, No. 2641, 2016 WL 2347430,
6 at *8 (D. Ariz. May 4, 2016). The case at bar makes it clear that subject matter jurisdiction
7 does not exist for lack of complete diversity. The only instance where subject matter
8 jurisdiction may be present is under the fraudulent misjoinder rule, which the Defendants
9 do not plead. Therefore, this Court declines to act in the absence of jurisdiction to do so.

10
11
12
13 B. Request for Sanctions

14 Under Federal Rule of Civil Procedure 11, this Court may issue sanctions pursuant
15 to a party's motion. Fed. R. Civ. P. 11. Sanctions are warranted where there are submissions
16 to the court that are: 1) presented for an improper purpose such as harassment; 2) frivolous;
17 or 3) lacking any reasonable evidentiary support. Fed. R. Civ. P. 11(b). When requesting
18 these sanctions, a party must make the request for sanctions separate from any motion and
19 specifically describe the conduct worthy of a sanction. Fed. R. Civ. P. 11(c). Here, the
20 Plaintiff has requested sanctions in its Motion to Remand and For Sanctions. Doc. 8. This
21 Court denies Plaintiffs request for two reasons.

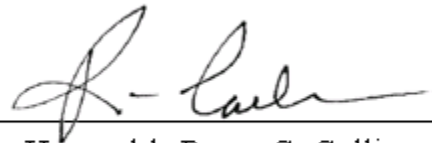
22
23
24 First, Defendants' argument, requesting that this Court exercise its power under
25 Federal Civil Procedure Rule 21, is not frivolous. Defendants argument is supported by
26 case law from several judicial circuits. While not endorsed by this Court, the Defendants'
27 request that the Court extend legal precedent is not frivolous.
28

1 Second, Plaintiff has failed to adhere to the procedural requirements imposed under
2 Rule 11. Rule 11 requires the party seeking sanctions to give notice to the opposing party.
3 Fed. R. Civ. P. 11(c). Only after notice and a 21-day waiting period can the moving party
4 petition this Court for sanctions. Additionally, the request for sanctions must be in a
5 separate and standalone filing, not accompanied by any other motion. Here, Plaintiff has
6 failed to comply with both the notice requirement and the standalone filing requirement.
7 Thus, Plaintiff's request for sanctions is denied.
8

9
10 **Conclusion**

11 For the foregoing reasons, Plaintiffs Emergency Motion to Remand and For
12 Sanctions (Doc. 1) is **GRANTED IN PART AND DENIED IN PART**. The request for
13 remand is granted. The request for sanctions is denied. This case shall be remanded to the
14 Superior Court of Pima County, Arizona. The Clerk of the Court is ordered to close the
15 Court's file in this matter.
16

17
18 Dated this 15th day of August, 2019.
19

20
21
22 

23 Honorable Raner C. Collins
24 Senior United States District Judge
25
26
27
28